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In The

Supreme Court of the United States

October Term, 1965

No. 1058

JOSEPH LUCIGNANO and EDWARD SKOWRON,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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JOSEPH LUCIGNANO and EDWARD SKOWRON,

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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Joseph Lucignano and Edward Skowron, respectfully pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Third Circuit entered in the above entitled causes on January 27, 1966 which judgments affirmed judgments of conviction of the United States District Court for the Eastern District of Pennsylvania entered on December 30, 1964, wherein petitioners were convicted of conspiring to violate Title 18, United States Code, Section 1952, in violation of Title 18, United States Code, Section 371.

Citations to Opinions Below

This case was tried before the United States District Court for the Eastern District of Pennsylvania, Honorable Ralph C. Body, Judge of said court, and a jury, commencing on June 8, 1964 and terminating on July 8, 1964. Petitioners were found guilty by the jury on a charge of conspiracy. On July 15, 1964 petitioners filed motions for the entry of judgments of acquittal, or in the alternative, for a new trial. Due to the untimeliness of the motions (Rules 29, 33, and 45, F.R. Crim. P.) the motions were dismissed by the District Court without a hearing. The opinion of the Court of Appeals, printed in Appendix B hereto, infra, has not as yet been officially reported.

Jurisdiction

The judgments of the Court of Appeals were entered on January 27, 1966. Copies thereof are printed in Appendix B hereto, infra. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

Questions Presented

1. Whether the trial court erred in denying petitioners' motion for the production and inspection of the grand jury testimony of the two chief Government witnesses, and particularly after the Government had utilized the testimony to refresh the recollection of each witness.

2. Whether the trial court erred in refusing to make an in camera examination of the jury to

ascertain if any jurors had read local newspapers, published during the trial, which reporter two murders by South Philadelphia "Rackets People and Loan Sharks."

3. Whether the evidence totally failed to establish the conspiracy alleged, but rather established two separate and distinct conspiracies, fatally and prejudicially at variance with the indictment.

4. Whether the evidence established knowledge on the part of the petitioners of the existence of a conspiracy.

Statutes Involved

The statutory provisions involved are Title 18 United States Code, Sections 371 and 1952. They are printed in Appendix A, infra.

Statement

Four individuals, Zavod, Kaplan, Roberts and Chivian sought to purchase a building in Philadelphia (12a).[1] A scheme was devised whereby this group would purchase the building for $85,000, and resell it to a civic association for $150,000 (15a, 53a). A broker, Lombardi, purchased the building for them, but could not cover the $13,500 deposit check given to the auctioneer (16a, 53a).

1: "a" refers to the record abstract printed as appellant's appendix in the United States Court of Appeals for the Third Circuit, which appendix has been certified and filed with this petition as a part of the official record below.

On the same day Roberts and Zavod met Harold Konigsberg in Bayonne, New Jersey (17a-19a). Konigsberg introduced the petitioners to Roberts and Zavod, stating that petitioner Lucignano was his bookkeeper (20a). A loan was made by Konigsberg of $13,500, to be repaid in thirty days with interest of $12,000 (21a). Weekly payments were made during July 1963 (23a, 147a). On July 23, Konigsberg extended the loan for thirty days, and added on an additional $5,000 interest (23a-24a). On July 30, 1963 Zavod made a payment at Konigsberg's office in Bayonne; both petitioners were present, and petitioner Lucignano was acting as the bookkeeper (24a-25a). On August 20, 1963 Zavod made a "late" payment to Konigsberg, but assured Konigsberg that the title closing on the building would take place the following day (25a-27a).

Unknown to Zavod, Roberts had borrowed $5,500 from Armand Colianni of Philadelphia, with the understanding that Colianni would receive $11,000 when the title closing on the building was consummated (54a-55a).

The closing of title on the building never took place, inasmuch as the mortgage money was never released, or disbursed, by the mortgage company (27a-29a; 30a). On August 27, 1963 Konigsberg came to Philadelphia, met with Zavod and Kaplan and others (30a-31a). Another extension of time for repayment of the loan was granted by Konigsberg, for an additional $5,000 interest (34a). The following day Konigsberg threatened Zavod on the telephone (35a). Two days later Roberts and Kaplan traveled to Bayonne, New Jersey where Konigsberg allegedly threatened and beat Kaplan (97a-

99a). The following day the group obtained a $13,500 bank loan and paid it to Konigsberg (99a, 100a, 144a). The following day Konigsberg traveled to Philadelphia and threatened Zavod in his home (35a-36a, 37a, 103a-104a).

At this point Zavod sought the aid of Armand Colianni (38a-39a). Colianni arranged, through Zavod, for Konigsberg to speak with him or Ignazio Denaro, at the request of Mr. A.B. (Angelo Bruno) (41a-42a). An unidentified individual, known as Harold's (Konigsberg) "Boss" called Zavod, and agreed to speak with a representative of Mr. A.B. (42a-43a). Thereafter, both Denaro and Colianni told Zavod and Kaplan that they would help them out of their predicament with Konigsberg (44a, 11a).

On September 7, 1963 a meeting was held in Philadelphia at the office of Lombardi the broker. From the group Roberts was present; Konigsberg attended, as did Denaro and Colianni. Although the trial testimony presented somewhat conflicting versions of what occurred at the meeting, it appeared that a decision was made between "Harold's Boss" and Mr. Bruno; Konigsberg would receive $4,000, Colianni $11,000; all payments would be made to Denaro, in order to prevent Konigsberg from harassing Zavod any further, and in order to keep Konigsberg out of Philadelphia (46a, 49a).

In October Konigsberg again began to demand full payment of $27,000 (49a). Zavod could not raise any money whatsoever, and on October 16, Denaro said he would have to tell Konigsberg about the situation (51a). At this point Zavod went to the Federal Bureau of Investigation, and related the entire episode (50a).

Zavod and Kaplan admitted that they were never threatened by Bruno, Denaro or Colianni (53a, 54a, 111a). Zavod was friendly with Colianni (54a) and stated that Denaro treated him "with kindness that a father would treat a son" (53a). Kaplan thought Denaro was very sympathetic and a "very fine gentleman" (110a). Both stated that neither Bruno, Colianni, nor Denaro had ever demanded money from them (54a, 55a, 110a to 113a), nor was there ever any attempt to extort money from them by Bruno, Colianni or Denaro (55a, 56a, 111a to 113a). Zavod and Kaplan considered Bruno, Colianni and Denaro with helping them (54a, 110a, 113a), and both credited Bruno with saving their lives (110a, 130a).

In the course of trial, the district court denied defense motions for production and inspection of the grand jury testimony of Zavod and Kaplan, although, as to each witness, the Government was compelled to utilize the grand jury testimony to refresh their recollection of each of them (121a-122a; 106a).

During the course of trial, the district court refused to declare a mistrial, or conduct an in camera examination of the jurors to determine if any of them had been exposed to two local newspaper articles concerning a murder in Philadelphia allegedly committed by racketeers and loan sharks (151a-154a; exhibits at 184a-187a).

The jury acquitted Stassi, Colianni, Denaro and Bruno. Petitioners were convicted of conspiracy (to travel in interstate commerce with the intent to commit extortion).

Reasons for Granting the Writ

1. At the trial the defense moved for the production and examination, for impeachment purposes, of the grand jury testimony of the key Government witnesses, Zavod and Kaplan. Numerous requests were made (56a, 61a, 80a, 93a, 94a, 85a, 120a, 121a, 132a). The trial court did make an in camera inspection of the testimony, but refused to turn it over to defense counsel.[2]

An analysis of the roles of Zavod and Kaplan in this case, their testimony, and events which took place in and out of the courtroom will clearly demonstrate that the requirements of a "Particularized need" were easily met, pointed out to the trial Court and the Court committed error in refusing the requests of defense counsel for the Grand Jury testimony.

There should be no doubt that Zavod was the Government's main witness, as his testimony and issues related to him over over five hundred pages of the transcript. The Government lifted any veil of secrecy of the Grand Jury minutes when it showed Zavod page 17 of his transcript in order to refresh his recollection on redirect (121a to 122a). That there was a likelihood of discrepancies in the Grand Jury testimony is borne out by the cross-examination. Zavod refused to answer who he called for

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2. The trial judge read the entire grand jury transcripts of Zavod and Kaplan. This fact was omitted from appellants' appendix, and the Government did not file an appendix to its brief. In response to a letter addressed to all counsel by the court below, it was ascertained that reference to the trial judge's statement that he had read all of the foregoing grand jury testimony, was located at pages 731, 990-991, and 1060-1061 of the trial record.

money, then said he couldn't remember and ended up by saying he didn't call anyone (60a to 61a). He admitted to receiving money from the Saturday Evening Post for supplying information for a story about the case (86a to 87a). He erroneously picked out photos of two men never indicted as being defendants on trial (85a to 86a). He admitted to many discrepancies and omissions between his signed statements to the F.B.I. and his testimony on direct (70a, 71a, 73a, 76a, 77a, 78a, 79a, 80a). On cross-examination, it became a great source of bewilderment to understand how the defendants from Philadelphia (Bruno, Denaro and Colianni) were indicted for he said none of them ever threatened him or his associates in any way and as a matter of fact, the defendant Denaro treated him "like a father would treat a son" (53a to 54a). The testimony of Zavod was greatly impaired by disinterested witnesses such as Rome, Taylor, Lombardi and even Kaplan. In response to a question whether Zavod ever put his arms around Konigsberg after the August 22, 1963 meeting in the Marvarn Office, he replied, "never in a million years" (69a). When Kaplan testified, he said that Zavod did in fact walk out with his arm around Konigsberg (113a).

As to the witness Kaplan the "particularized need" was demonstrated even more clearly. In addition to what has been said above about Zavod, Kaplan was even more confused on his direct examination. When the Government attempted to refresh his recollection with page 16 of his Grand Jury testimony, the witness responded with: "in this statement here that I have just read, if I may, I believe I confused the issue at the time before the jury, the Grand Jury. I am trying to correct my memory at the present time with this" (106a).

Kaplan admitted to picking out from photographs the wrong man as the defendant Stassi. He identified as Stassi a man never indicted (117a to 118a). He also made a similar mistake with the man dubbed as "Mr. X" during the trial of the case (118a to 120a). Kaplan also said on cross-examination: "I don't mean to be evasive with you -- the events have just been -- are just a sequence of events without time, without meaning, without being, without ever existing even. It is just a nightmare that happened" (115a).

With respect to each of these witnesses, it must be logically concluded that, having testified with conflicting versions of the same incident, having admitted numerous discrepancies between trial testimony, and statements given to the F.B.I., and having been unable to remember some incidents at all, there must be conflicts and discrepancies between the trial testimony and that which was stated before the Grand Jury. Additionally, and with respect to each of these witnesses, the Government had to use the Grand Jury testimony to refresh each of their respective recollections.

This Court last dealt with the question of access to grand jury testimony for impeachment purposes in Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395 (1959) wherein it was held (360 U.S. at 400) that grand jury minutes should be made available directly to the defense in cases where a "particularized need" is shown. The Court declined to pass on the duty of the trial

in camera, deeming that question not properly raised (360 U.S. at 401). Four justices dissented and expressed the view (derived from Jencks v. United States, 353 U.S. 657, 667-69 (1951) that since

in camera inspection by the judge may not sufficiently protect the rights of the accused, the relevant testimony of prosecution witnesses should be produced directly to the defense on request.

The conflict in the practice of the federal courts which has ensued since the Pittsburgh case has been remarked upon by commentators.[3] It seems pointless to require a special showing of need, the bounds of which are difficult to specify and are causing awkward conflicts in federal criminal practice,[4] although petitioners contend herein that any such burden placed upon them was abundantly demonstrated to the trial court. Nonetheless, this Court may also wish to reconsider the conclusion

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3. Calkins and Wiley, Grand Jury Secrecy under the Illinois Code, 59 Nw. U.L. Rev. 577, 581, n. 18 (1964). The authors cite additional cases and conclude that the Seventh Circuit follows the practice of the Second Circuit, while the Eighth and Ninth Circuits are in accord with the Tenth Circuit.

4. See United States v. McKeever, 271 F.2d 669 (C.A. 2); United States v. Boyance, 329 F.2d 372-376-77 (C.A. 3); United States v. Bertucci, 333 F.2d 292, 297 (C.A. 3); United States v. Micele, 327 F.2d 222, 226-27 (C.A. 7); United States v. Coduto, 284 F.2d 464 (C.A. 7); United States v. Keegan, 331 F.2d 257, 263 (C.A. 7); Berry v. United States, 295 F.2d 192-194-95 (C.A. 8); Brilliant v. United States, 297 F.2d 385 (C.A. 8); Hance v. United States, 299 F.2d 389 (C.A. 8); Herzog v. United States, 226 F.2d 561 (C.A. 9); aff'd en banc, 236 F.2d 664; Bary v. United States, 282 F.2d 53, 56 (C.A. 10); Gordan v. United States, 299 F.2d 117, 313 F.2d 582 (C.A.D.C.), cert. denied, 374 U.S. 839.

It is significant to note that the government itself formerly favored the adoption of the Second Circuit rule. See Pittsburgh Plate Glass, 360 U.S. at 408-09 (dissenting opinion), and brief for the United States (p. 20) in United States v. Spangelet, 258 F.2d 338 (C.A. 2).

reached in the Pittsburgh case. [5] Production of grand jury testimony directly to the defense seems to have been virtually eliminated, [6] despite the majority's statement that it should be allowed on the basis of "particularized need" and the minority's view that it should be allowed as a general proposition, under the principles of the Jencks case. This is particularly true in the case at bar, wherein the Government was compelled to lift the "veil" of so-called secrecy cloaking the grand jury testimony to refresh the recollection of its two chief witnesses. Apropos here is the comment of Mr. Justice Brennan, dissenting in the Pittsburgh case, supra:

> "Of course, when the Government uses Grand Jury minutes at trial the defense is ordinarily entitled to inspect the relevant testimony in those minutes. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 233; United States v. Cotter, 60 F.2d 689." 360 U.S. at 404.

5. Apart from conflict with respect to when in camera inspection should be allowed, the inspection process itself is productive of appeals and reversals. In three cases, the Court of Appeals for the Second Circuit found inconsistencies which escaped the trial judge. United States v. Spangelet, 258 F.2d 338; United States v. Zborowski, 271 F.2d 661; United States v. McKeever, 271 F.2d 669. And, in Gordon v. United States, 313 F.2d 582 (C.A.D.C.), cert. denied, 374 U.S. 839, the majority thought the trial judge correct in finding no inconsistencies which might have been helpful to the defense, but Chief Judge Bazelon, dissenting, found nine of them (313 F.2d at 583-85).

6. We know of only one case since the Pittsburgh Plate Glass case in which the court approved production of grand jury testimony directly to the defense. DeBinder v. United States, 292 F.2d 737 (C.A.D.C.). But, thereafter the same court has sanctioned only in camera inspection.

2. During the course of trial, the June 30, 1964 morning edition of the Philadelphia Inquirer reported a murder in Philadelphia (185a). The wife of one Jack Lopinson, and his business partner had been slain (185a). The front page of the Final City Edition stated:

> "RACKETEERS, LOAN SHARKS, HIRED KILLERS OF WIFE AND PARTNER, LOPINSON ASSERTS" (187a).

The first paragraph on the first page of the Inquirer went on to state:

> "Restauranteur Jack Lopinson said Monday he thinks his wife and business associate were slain by professional killers lured by 'South Philadelphia Rackets People and Loan Sharks.'" (Emphasis added.)

A mistrial was requested, or in the alternative that the jurors be polled to ascertain if they had seen the article, and if so, what effect it had upon any of them (151a to 154a).

The Government itself was confused as to what to do about this incident. The United States Attorney stated that the Government had no objection to an examination of the jurors (153a). The Special Assistant to the Attorney General, co-counsel for the Government with the United States Attorney, objected to both the application for a mistrial as well as polling the jurors (153a). Both requests were denied by the trial court (154a).

This Court is responsible for the supervision of the administration and enforcement of criminal

justice in the Federal Courts. McNabb v. United States, 318 U.S. 332 (1942); Marshall v. United States, 360 U.S. 310 (1959). The failure of the trial judge to inquire of the jurors as to whether any of them had read the newspaper articles in question is in conflict with the procedure apparently sanctioned by this Court in the Marshall case, supra, wherein the trial judge did conduct an in camera examination. The decision below is in conflict with an earlier opinion in the same circuit, United States v. Carlucci, 288 F.2d 691 (3d Cir. 1961), cert. denied, 366 U.S. 961 (1961). The decision below also appears to be in conflict with the principles enunciated by the First and Sixth Circuits in Calo v. United States, 338 F.2d 793 (1st Cir. 1964), United States v. Briggs, 221 F.2d 636 (6th Cir. 1955) and Marson v. United States, 203 F.2d 904 (6th Cir. 1953). The Court below had heretofore recognized that prejudicial newspaper accounts are not limited or restricted to divulgence of a defendant's prior criminal record. See United States v. Kum Seng Seo, 300 F.2d 623 (3d Cir. 1962).

Although the news accounts referred to made no specific reference to petitioners, they were on trial for extortion; they were obviously associated with a loan shark, to one degree or another; the testimony at the trial was replete with references to threats and physical violence on the part of Konigsberg while in Bayonne and in Philadelphia in connection with his loan shark operation. Under these circumstances, the very least that the trial judge should have done was to examine the jurors in camera as to any possible prejudice towards petitioners from exposure to the newspaper accounts.

3. The Government's case demonstrated, at best, two separate and distinct conspiracies. One was a conspiracy engineered by Konigsberg, the objective of which was to travel from New Jersey to Philadelphia, Pennsylvania, and thereafter commit extortion by extracting from the Philadelphia group usurious interest at loan shark rates. The Government's case equally demonstrated a conspiracy on the part of Bruno, Denaro and Colianni, the objective of which was to prevent Konigsberg from coming to Philadelphia and prevent any extortion in Philadelphia by Konigsberg. Rather than joining in a common design and agreement, the Bruno group obstructed and prevented the Konigsberg group from achieving the objectives of its conspiracy. The result, a fortiori, is two separate and distinct conspiracies not charged in the indictment.

Proof of separate and distinct conspiracies, where a single conspiracy has been charged, is fatally defective, where prejudice may be shown. Blumenthal v. United States, 332 U.S. 539 (1948); Kotteakos v. United States, 328 U.S. 750 (1946). Stated differently, a defendant may not be convicted of a charge not made against him in the indictment. Stirone v. United States, 361 U.S. 212 (1960).

Had the Government alleged two conspiracies, hearsay declarations and acts of alleged co-conspirators would have been inadmissible. The entire testimony of the star witnesses, Zavod and Kaplan, replete with hearsay quotes of members of the Philadelphia group, was admitted into evidence against petitioners. There is no question that prejudice such as this establishes the variance to be of fatal dimension. Kotteakos, supra; Glasser v. United States, 315 U.S. 60 (1942); Daily v.

United States, 282 F.2d 818 (9th Cir. 1960), rehearing on another issue 293 F.2d 33 (1961); Rocha v. United States, 288 F.2d 545 (9th Cir. 1961), cert. denied, 366 U.S. 948 (1961); United States v. Russano, 257 F.2d 712 (2d Cir. 1958); Brooks v. United States, 164 F.2d 142 (5th Cir. 1947).

4. This Court has not hesitated to grant certiorari, on questions of fact, and summarily reverse federal criminal convictions for the insufficiency of evidence. United States v. Washington, 357 U.S. 348 (1958). In the instant case, there is simply no evidence to substantiate a conclusion that petitioners were parties to the conspiracy charged, had knowledge of it, or participated in the furtherance of its objectives.

Petitioners convictions should stand only if there was proof that they had knowledge of a conspiracy, Direct Sales Co. v. United States, 219 U.S. 703, 711 (1942); that they furthered its objectives, United States v. Falcone, 311 U.S. 205 (1940); that they possessed the same criminal intent as required to prove the substantive offense which is the object of the conspiracy, and that they shared knowledge of the unlawful agreement and were a party thereto, Ingram v. United States, 360 U.S. 672 (1959). All of the foregoing is totally and wholly absent.

The gist of the conspiracy in this case, assuming that there was only one conspiracy, was an agreement to travel from Bayonne, New Jersey to Philadelphia, Pennsylvania and while in Philadelphia commit extortion. It is never permissible to enlarge the scope of the conspiracy by proving that a particular conspirator, unknown to the rest,

has done something beyond the reasonable intendment of the common understanding. United States v. Crimmins, 123 F.2d 271 (2d Cir. 1941); United States v. Andolscheck, 142 F.2d 503 (2d Cir. 1944).

There was no proof whatsoever that petitioners knew of a conspiracy to travel in interstate commerce in order to commit extortion. See United States v. Zizzo, 338 F.2d 577 (7th Cir. 1964). Petitioners were, to be sure, in the employ of a loan shark. However, there was no proof that they knew of any acts of extortion in Pennsylvania by Konigsberg or that they knew of Konigsberg's intent to travel to Philadelphia to commit extortion. Even assuming that petitioners had acquiesced in Konigsberg's activities, they were not conspirators. Thomas v. United States, 57 F.2d 1039 (2d Cir. 1938).

Conclusion

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioners

Dated: February 20, 1966.

Appendix A

Statutory Provisions Cited and Quoted

18 U.S.C. Section 371

Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. Section 1952

Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to --

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further

any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasury.

Appendix B

Copies of Opinion and Judgments Below

Opinion of the United States Court of Appeals
For the Third Circuit

(Filed - January 27, 1966)

UNITED STATES COURT OF APPEALS
For The Third Circuit

No. 15224

UNITED STATES OF AMERICA

vs.

HAROLD KONIGSBERG, ANTHONY STASSI, JOSEPH LUCIGNANO, EDWARD SKOWRON, ARMAND COLIANNI, Alias ARTIE COLIANNI, IGNAZIO DENARO, Alias IGNATIUS DENARO, Alias MR. IGNATIUS, ANGELO BRUNO ANNALORO, Alias ANGELO BRUNO, Alias A. B.

JOSEPH LUCIGNANO,

Appellant

Appendix B – Opinions and Judgments Below

No. 15225

UNITED STATES OF AMERICA

vs.

HAROLD KONIGSBERG, ANTHONY STASSI, JOSEPH LUCIGNANO, EDWARD SKOWRON, ARMAND COLIANNI, Alias ARTIE COLIANNI, IGNASIO DENARO, Alias IGNATIUS DENARO, Alias MR. IGNATIUS, ANGELO BRUNO ANNALORO, Alias ANGELO BRUNO, Alias A. B.

EDWARD SKOWRON,

Appellant

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued October 4, 1965

Before Biggs, Chief Judge, and Maris and Staley, Circuit Judges

Opinion of the Court

(Filed January 27, 1966)

PER CURIAM.

We have examined carefully each point raised

by the defendant-appellants and the testimony given before the grand jury by Zavod and Kaplan has been read and weighed in the light of the record of the trial. See United States v. Boyance, 329 F.2d 372 (3 Cir. 1964) and United States v. Bertucci, 333 F.2d 292 (3 Cir. 1964). We find no error in the proceedings in the court below. Consequently, the judgments of conviction will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

Appendix B – Opinions and Judgments Below

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 15,224

UNITED STATES OF AMERICA

vs.

HAROLD KONIGSBERG, ANTHONY STASSI, JOSEPH LUCIGNANO, EDWARD SKOWRON, ARMAND COLLANNI, alias ARTIE COLLIANNI, IGNAZIO DENARO, alias IGNATIUS DENARO, alias MR. IGNATIUS, ANGELO BRUNO ANNALORO, alias ANGELO BRUNO, alias A. B.

JOSEPH LUCIGNANO,

Appellant

(D. C. Criminal No. 21559)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVNAIA

Present: BIGGS, MARIS and STALEY,
Circuit Judges.

Appendix B – Opinions and Judgments Below

Judgment

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of conviction, of the District Court be, and the same is hereby affirmed.

ATTEST:

IDA O. CRESKOFF

Clerk

January 27, 1966

Appendix B – Opinions and Judgments Below

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 15,224

UNITED STATES OF AMERICA

vs.

HAROLD KONIGSBERG, ANTHONY STASSI, JOSEPH LUCIGNANO, EDWARD SKOWROW, ARMAND COLLANNI, alis ARTIE COLLIANNI, IGNAZIO DENARO, alias IGNATIUS DENARO, alias MR. IGNATIUS, ANGELO BRUNO ANNALORO, alias ANGELO BRUNO, alias A. B.

EDWARD SKOWRON,

Appellant

(D.C. Criminal No. 21559)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: BIGGS, MARIS and STALEY,
Circuit Judges.

Judgment

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of conviction, of the District Court be, and the same is hereby affirmed.

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IDA O. CRESKOFF

Clerk

January 27, 1966

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1058

JOSEPH LUCIGNANO AND EDWARD SKOWRON,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 4a-5a) is reported at 354 F. 2d 1007.

JURISDICTION

The judgment of the court of appeals (Pet. App. 6a-7a) was entered on January 27, 1966. The petition for a writ of certiorari was filed on February 25,

1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence supports the jury's verdict that petitioners participated in a single conspiracy.

2. Whether the trial court erred in refusing, after an *in camera* inspection of the grand jury testimony of two government witnesses, to order the transcripts turned over to petitioners.

3. Whether the trial court erred in refusing to interrogate jurors regarding a newspaper article which appeared during trial in which petitioners were not mentioned.

STATEMENT

Petitioners were convicted, after trial by jury which lasted four weeks, of conspiring to violate 18 U.S.C. 1952 by traveling in and using the facilities of interstate commerce and willfully causing such travel and use by others with intent to promote and carry on extortion in violation of State law. Petitioner Skowron was sentenced to five years' imprisonment, and petitioner Lucignano to three years' imprisonment.

1. *The crime.* Four Philadelphia businessmen—Zavod, Kaplan, Roberts and Colianni—needed money quickly for a real-estate promotion scheme. Through Anthony Stassi, Roberts communicated with Harold Konigsberg, a Bayonne, New Jersey loan shark (App.

18a-19a). Roberts and Zavod went to see Konigsberg in Bayonne, and they arranged a $13,500 loan, to be repaid in thirty days at 8 percent interest with $675 payments to be made weekly (App. 21a). Konigsberg indicated with a loaded revolver and a rubber hose that the borrowers would be subject to physical violence if they defaulted on repayment (App. 22a). Petitioners were present during the transaction and threats (App. 19a), and petitioner Skowron, at Konigsberg's orders, laid hands on Zavod to illustrate the hazards of a default of repayment (Tr. 56). The weekly $675 payments were personally carried by one or another of the borrowers from Philadelphia to Bayonne, where they were received and noted by Lucignano in Skowron's presence (App. 23a-25a). When payments were made by Zavod, Lucignano inquired whom they were from, and was told "Joe from Philadelphia" (App. 24a). Additionally, Lucignano received and logged telephone calls from the borrowers to Konigsberg (App. 42a; Tr. 1703). In many instances, the notations made by Lucignano indicated that interstate calls were made (G.X. G-22A).

When the loan from Konigsberg fell due, the borrowers were unable to make full repayment because their promotion scheme had not been completed (App. 29a). Thereafter, Konigsberg summoned the promoters to Bayonne (App. 34a-35a). Despite telephonic threats from Konigsberg (App. 35a), Zavod did not attend because of illness, but Kaplan and Roberts came. In Skowron's presence, Konigsberg struck Kaplan a number of times with a wire-filled rubber hose and threatened him with death if he did not pay

the money in full by the following Monday (App. 97a-99a). Kaplan then managed to borrow $13,500, which he gave to Konigsberg (App. 99a-100a). Konigsberg thereafter visited Zavod at his home in Philadelphia, and coerced from him a bill of sale to the latter's house, conditioned upon Zavod's paying $13,500 to him by September 30 (App. 35a-37a).

At this point, Zavod spoke with Colianni, from whom Roberts had borrowed money to make partial payments to Konigsberg (App. 28a-29a, 38-39). When Konigsberg again demanded money, Zavod said that he had paid it in Philadelphia. Konigsberg replied, "You are not supposed to give that money to anybody but me. I don't know anybody in Philadelphia" (App. 40a-41a). A meeting was then set up in Philadelphia among the borrowers, Konigsberg, an individual identified only as Konigsberg's "boss", Colianni, and three other individuals in the loan-shark business in Philadelphia (acquitted co-defendants Denaro, Testa and Bruno). The Philadelphia group was displeased that Konigsberg had invaded its territory (Tr. 206). Bruno and Konigsberg's "boss" therefore decided that the borrowers were to pay an additional $15,000 beyond the $13,500 which Kaplan had already paid Konigsberg. Of that amount $4,000 was to go to Konigsberg and $11,000 to Colianni in repayment of the $5,500 which he had advanced to Roberts. Konigsberg was to stay out of Philadelphia and put no further pressure on the borrowers (App. 46a-48a).

The borrowers were still unable to bring the real estate promotion scheme to fruition. After a number

of threats from Colianni and Denaro that they would be unable to hold Konigsberg back much longer, Denaro told Zavod that he would have to tell Konigsberg to collect the debt in his own way (App. 49a-50a). At this point, Zavod advised the F.B.I. of the entire story (App. 50a).

Petitioners and co-defendants Konigsberg, Stassi, Colianni, Denaro and Bruno were indicted on eight counts, the first count charging conspiracy to violate 18 U.S.C. 1952. Konigsberg's trial was severed, and petitioners were convicted on the conspiracy count. The other defendants were acquitted.

2. *The use of grand jury testimony.*

a. At the trial Kaplan testified about a meeting that he and Zavod had with Colianni and Denaro after Zavod had communicated with Colianni. He said that he told the two defendants the story of the loan and that they expressed deep sympathy and promised to try to take care of things (Tr. 608-611, 619; App. 104). When he was asked if he could recall anything else these defendants had said, he testified that he recalled a conversation "but it was not a conversation with Mr. Colianni and Mr. Denaro." At this point, government counsel attempted to refresh the witness' recollection with a report of a statement he had made to the F.B.I. When the defense objected to the F.B.I. statement, the government withdrew the statement and substituted, with leave of court, fourteen lines of his grand jury testimony. After examining the transcript, Kaplan said it did not differ from what he had previously testified. The only ad-

ditional matter he recalled was that he had asked Zavod whether "Mr. A. B. (defendant Bruno) would be contacted", and Colianni had replied, "Yes" (Tr. 622-636; App. 104a-106a).

Zavod had previously testified with regard to this meeting, and had said that he had told Denaro everything that happened and that, as they were leaving, Colianni had said that "Denaro was close with Mr. A. B." (App. 43a-44a).

b. Zavod had testified regarding Konigsberg's reaction to Zavod's communication with the Philadelphia group. See *supra*, p. 4. In redirect examination he was asked if Konigsberg had ever represented that he knew someone in Philadelphia. He first replied, "Not that I can recall." Government counsel was then permitted to use one paragraph of his grand jury testimony to refresh his memory. After examining his grand jury testimony, Zavod answered the question, "No" (App. 121-123; Tr. 918-929).

The trial judge read all the grand jury testimony of Zavod after the defendants requested that he review the transcript for inconsistencies (App. 83a-85a). He also read the grand jury testimony of Kaplan upon a similar request (App. 120-121; Tr. 902-905). In both instances he concluded that the transcripts need not be turned over to the defense (Tr. 731, 973, 1060-1061).[1] The court of appeals also read the grand jury testimony of these witnesses in light of the trial record, and it sustained the trial judge's exercise of discretion (Pet. App. 4a-5a).

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[1] The defense was, however, shown the particular passages used to refresh the witnesses' recollections.

ARGUMENT

1. The indictment charged a single conspiracy to use and cause the use of the facilities of interstate commerce to extort money from the borrowers. Petitioners, Konigsberg and Stassi were alleged to be the original conspirators, and Colianni, Denaro and Bruno were alleged to have joined the conspiracy when they interceded, claimed a share of the proceeds, and used the threat of further violence by Konigsberg in an effort to pressure the borrowers into paying. The jury, by its verdict, acquitted Colianni, Denaro and Bruno of having joined the conspiracy and Stassi of having taken part in its formation. Nevertheless, the evidence supports the verdict of a conspiracy among petitioners and Konigsberg. Petitioners were present when Konigsberg made the loan and threatened the borrowers with physical violence to insure repayment, and petitioner Skowron participated at least to the extent of demonstrating the hazards of default. Skowron was also present when Konigsberg beat and threatened Kaplan in order to extract a payment of $13,500. When the loan was made (in the presence of both petitioners), Zavod indicated that he was taking the money to Philadelphia (Tr. 56). Thereafter, Lucignano received the partial payments in Bayonne with knowledge that they had been brought from Philadelphia. He also received and logged telephone messages from the borrowers, and the contents of his notes indicate that the calls were interstate. There was thus sufficient evidence for the jury to find petitioners participated in

the scheme with Konigsberg with knowledge both of the extortion and of the use of interstate facilities and travel.

2. The court of appeals properly affirmed the district court's disposition of motions pertaining to grand jury testimony of government witnesses. This case does not involve the questions whether, and under what circumstances, trial courts are required to make *in camera* inspection of grand jury testimony of trial witnesses (compare *Dennis* v. *United States*, No. 502, this Term) because the district judge in this case read the grand jury testimony and concluded that it showed no inconsistencies.[2]

Nor did circumstances of this case entitle the defendants, in the interests of justice, to examine the requested grand jury testimony in the absence of inconsistencies. Over eighty pages of prior statements given by Zavod and Kaplan to the F.B.I. were turned over to the defense pursuant to 18 U.S.C. 3500 (Tr. 258-259, 672-673; App. 80a),[3] and cross-examination

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[2] The trial judge was not compelled to make an *in camera* inspection by the law applicable in the Third Circuit, which requires such inspection only upon a showing of a "likelihood of discrepancies," *United States* v. *Boyance*, 329 F. 2d 372, 377, certiorari denied *sub nom. Feldman* v. *United States*, 377 U.S. 965, or other "particularized need." *United States* v. *Bertucci*, 333 F. 2d 292, certiorari denied *sub nom. Doherty* v. *United States*, 379 U.S. 839. The Second Circuit, on the other hand, makes an *in camera* inspection an absolute requirement. *United States* v. *Giampa*, 290 F. 2d 83, 85.

[3] The requirements of that statute do not apply to notes of grand jury testimony. *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, 398.

of the two witnesses was extensive, covering over five hundred pages of the trial transcript and consuming approximately one-fourth of the trial.

The government was permitted to show one paragraph of Zavod's grand jury testimony and 14 lines of Kaplan's grand jury testimony to the witnesses to refresh their recollections, and these segments were shown to the defense. This did not compel disclosure of the balance. All that was involved was a small fraction of their testimony which had no bearing on petitioners' guilt but which dealt with the participation of the Philadelphia group in the conspiracy. There was, moreover, no claim at the trial that Kaplan's recollection that Bruno's name had been mentioned at the meeting with defendants Colianni and Denaro opened the door to all of the grand jury testimony. Nor did the single paragraph of Zavod's testimony shown to him during his direct examination lead to any significant change in testimony. In these circumstances, the trial court properly exercised his discretion, in light of the policy favoring grand jury secrecy, in not revealing all of the grand jury testimony of these witnesses.

3. During the trial, a sensational and well publicized murder took place in Philadelphia. A newspaper story linked the slaying to "South Philadelphia rackets people and loan sharks," and co-defendant Bruno was incidentally mentioned by name in the story (App. 185a-187a). Petitioners claim error in the refusal of the trial judge to interrogate the jurors to determine if any of them had read the stories.

Since it would only have suggested to the jurors that there was some relationship between the facts set out in the newspaper story and the trial in which they were participating, it was proper for the district judge to refuse to conduct such an examination. In any event, since Bruno and the other Philadelphia defendants were acquitted, it is clear that the story had no prejudicial effect on the trial. Petitioners, who are from Bayonne, New Jersey, can hardly claim that the story prejudiced them.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL 1966

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